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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

FLORA ALICIA OCANA,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1.

Whether due process and U.S.S.G. § 1B1.3 allows a relative conduct sentence enhancement for a defendant's alleged post-conviction conduct when this conduct is substantially dissimilar and distinct from the offense of conviction and is also the subject of a separate, pending indictment.

2.

Whether due process requires more than preponderance of the evidence to prove relevant conduct upon sentencing when the resulting sentence enhancement is the "tail that wags the dog of the substantive offense."

3.

Whether due process and U.S.S.G. § 6A1.3 allows a criminal defendant to be sentenced only on the inconsistent, uncorroborated and contradictory testimony of convicted criminals hoping for leniency, or whether the defendant must show that their testimony is "materially untrue" in order to have the testimony discounted by the sentencing court.

LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Fifth Circuit. In the district court, Petitioner was charged along with a co-defendant, Keenan Stroud Bennet.

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IN THE SUPREME COURT OF THE UNITED STATES

FLORA ALICIA OCANA,

Petitioner

v.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Flora Alicia Ocana, the Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on March 27, 2000.

OPINIONS BELOW

The Petitioner seeks review of a split opinion of the Fifth Circuit published as United States v. Ocana, 204 F.3d 585 (5th Cir. 2000), and attached to this Petition as Appendix A. Petitioner motioned for panel rehearing, which was denied in an unpublished split opinion under the Fifth Circuit case number 98-41133, attached as Appendix C. The prior judgment of the United States District Court for the Southern District of Texas,

Cr. No V-97-19-02, is unpublished. The district court's findings of fact were given orally at a sentencing hearing held on August 28, 1998. A transcription is attached as Appendix B.

STATEMENT OF THE JURISDICTION

The Fifth Circuit panel issued its judgment on March 27, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the due process clause of the Fourteenth Amendment to the United States Constitution and United States Sentencing Guidelines §§ 1B1.3 and 6A1.3, the texts of which are set forth in Appendix D.

STATEMENT OF THE CASE

This case deals with the sentencing of a criminal defendant who assisted the Government in apprehending several of her co-defendants. Petitioner's sentence was doubled based on "relevant conduct" *that did not occur until after she pled guilty and was convicted.* The only evidence that this relevant conduct even involved the Petitioner came from the inconsistent testimony of two recently apprehended marijuana traffickers, who each had a strong motive to falsely implicate the Petitioner.

Even the Government's attorney candidly recognized that these witnesses had a "credibility problem." (Appendix B).

A. The Petitioner's Offense of Conviction

On April 19, 1997, Petitioner Flora Alicia Ocana (hereinafter "Ocana") was apprehended by a Texas Department of Public Safety Officer with 90 kilograms of marijuana. Ocana's co-defendant, Keenan Stroud Bennet ("Bennet"), paid Ocana ten thousand dollars ($10,000.00) to transport the marijuana to him. Ocana agreed to complete the delivery accompanied by FBI agents and DPS narcotics officers, and her assistance led to the arrest and conviction of Bennet.

On July 25, 1997, Ocana pled guilty to a count of conspiracy to possess with intent to distribute approximately 90 kilograms of marijuana in violation of Title 21 U.S.C. §§ 846, 841(a)(1) and (b)(1)(C). In his initial Presentence Report (PSR), the probation officer recommended that Ocana only be imprisoned for 37 to 46 months. As part of her plea agreement, the Government agreed to recommend that Ocana be sentenced to custody at the lowest end of the applicable guideline range, which in Ocana's case was 37 months confinement.

B. The Post-Conviction "Relevant Conduct" and the Sentencing of the Petitioner

On November 1, 1997, U.S. Border Patrol agents arrested common-law husband and wife Ricardo Flores ("Flores") and Norma Salinas Cervantes ("Cervantes") at a border checkpoint near Falfurias, Texas. They had in their

possession 48 kilograms of marijuana. Upon interrogation, Cervantes told Border Patrol Agents that the marijuana belonged to Ocana. These agents then confronted Flores with his wife's statements and asked him if he agreed with them. Flores answered affirmatively. During this interrogation Cervantes stated that she first met Ocana in April of 1997, and Ocana first approached her and Flores about transporting the marijuana in October of 1997.

Based on Cervantes's accusations, the probation officer amended his PSR to recommend that Ocana serve a 78 to 97 month term of imprisonment--nearly three times what Ocana originally expected when she pled guilty--even though the incident did not occur until five months after Ocana was convicted! This amended PSR was filed on June 11, 1998. Additionally, in July of 1998, Ocana was indicted in a separate criminal proceeding for her alleged involvement with the Cervantes/Flores offense. The Government later dismissed this indictment after Ocana was sentenced for her initial conviction.

Ocana was not sentenced until August 28, 1998. Both Flores' and Cervantes' testified at the sentencing hearing. However, their testimony differed substantially from what they told the government agents when they were first interrogated.

At the sentencing hearing, the court placed the witnesses under the rule, and Flores testified first. Under oath, Flores stated that he and his wife first met Ocana in September of 1997. After Flores left the stand, Cervantes testified that she and her husband first met Ocana on April 28, 1997, at her daughter's husband's birthday party in a park. While specificity

usually bolsters one's credibility, Cervantes' testimony was essentially implausible or even false--Ocana was in federal custody from April 19, 1997 until May 29, 1997. After some prompting by the Government's attorney, Cervantes testified that Ocana first asked she and Flores to transport marijuana in September of 1997--not in October as she originally told the government agents when she was arrested. Later in the examination, Cervantes testified that her and Flores transported their first load for Ocana in July of 1997!

Cervantes and Flores also contradicted the amended PSR and each other's testimony in regards to the amount they were paid for each trip, the number of trips they took, and in the details of each of the trips. Ocana's role in the offense of her conviction was that of a mule--a paid courier transporting drugs at the behest of her co-defendant Bennet. According to Flores and Cervantes, even though Ocana had turned in her co-conspirators and herself was a convicted felon awaiting sentencing, they were willing to deal with her. They also asked the court to believe that Ocana had suddenly turned from mere courier to distributor, paying others to transport marijuana for her.

At the sentencing hearing, testimony revealed that Flores and Cervantes owed Ocana money, and that Cervantes' teenage son had impregnated Ocana's daughter, and the boy refused to take responsibility for the child. Flores and Cervantes testified that they knew that Ocana was a convicted drug runner when they were arrested on November 1, 1997. Testifying at the sentencing hearing, FBI Agent Rob Andrews conceded that Ocana would be a convenient and lucrative target for Flores and

Cervantes to implicate when caught. Agent Andrews also testified that Flores and Cervantes had lied to him in the past. Flores and Cervantes each pocessed criminal records before their November 1, 1997, arrest. Cervantes, in particular, was convicted of tampering with government records in 1989.

Viewing the evidence in the light most favorable to the Government, even if Ocana was involved in Flores' and Cervantes' criminal conduct, she did not embark upon this criminal enterprise until more than a month after she had pled guilty to the offense of her conviction. Despite this fact and despite the fact that even the Government's attorney recognized that his witnesses had a severe "credibility problem," the district court counted Flores' and Cervantes' November 1, 1997, offense as part of the "same course of conduct" as the offense to which Ocana pled guilty. Following the Government's suggestion, the court *did not* include the alleged July, September and October trips as part of the same course of conduct. (Appendix B). The district court attributed the 48 kilograms of marijuana found in Flores and Cervantes' possession on November 1, 1997, to Ocana and sentenced Ocana to 90 months imprisonment. Before she was sentenced, Ocana told the district judge that while she accepted responsibility for the offense of her conviction, she would never plead guilty to the things Flores and Cervantes accused her of doing. She maintains that she had nothing to do with Flores and Cervantes' marijuana trafficking.

C. Appellate Rulings Below

The Fifth Circuit Court of Appeals accepted jurisdiction over Ocana's appeal pursuant to 18 U.S.C. § 3742.

On appeal, a divided panel affirmed Ocana's sentence. While the majority recognized that "the testimony of Flores and Cervantes contains multiple inconsistencies," it ruled that inconsistent testimony alone does command that it "ignore the District Court's appreciation of their testimony as reliable." United States v. Ocana, 204 F.3d 585, 593 (5th Cir. 2000) (Appendix A). Instead, Ocana, the criminal defendant, bears the burden of demonstrating that the information the district court relied on is "materially untrue." Id., quoting United States v. Young, 981 F.2d 180, 185 (5th Cir. 1992).

The majority also affirmed the district court's classification of the Flores and Cervantes offense as within the "same course of conduct" as the offense of Ocana's conviction. Id. at 589-92. Even though the majority found that the two incidents were not similar, it found that they were sufficiently regular and temporally proximate to affirm the district court's finding because, "Cervantes and Flores testified that Ocana recruited them for trips in July, September and November," and "these offenses took place only three months after Ocana's offense of conviction." Id. at 590-91. The majority neglected to mention that the district court only expressly found the November trip to be part of the same course of conduct as Ocana's offense of conviction.

Most importantly, the majority failed to address the critical fact that Ocana was sentenced for conduct that did not occur until after she pled guilty. Without citing authority, it simply stated that, "Under § 1B1.3 district courts are permitted to consider unadjudicated offenses which *occur after the offense of conviction.*" Id. at 589 (emphasis added). It did not discuss whether the guidelines allowed sentence enhancements for conduct *occurring after the conviction itself.*

Judge Politz vehemently dissented, observing that the majority's decision, and others like it, "erode the basic tenet" of guilt beyond a reasonable doubt "to the point that we must, in all candor, concede that today punishment for criminal conduct is not limited to the criminal conduct for which one has pled guilty or which has been established by proof beyond a reasonable doubt." Id. at 593-94 (Politz, J., dissenting). Politz further remarked that:

> At this point in time the proof of guilt of the charged offense must be beyond a reasonable doubt but the proof of "facts" upon which the sentence is based, the *sine qua non* of punishment for that criminal offense, need only be by a level of proof far below that mandated by a criminal trial. Indeed, I would presume to suggest, on more than a few occasions by a level of proof which would not carry the day in a contested civil case. . . .

> By accepting the government's proof of the subsequent conduct by evidence which, in my opinion would not have sufficed in a criminal trial, indeed probably would have been found wanting in a civil trial, and thereby markedly increasing Ocana's exposure under the sentencing guidelines, neuters the constitutional assurance that one shall not be deprived of liberty and freedom based upon anything less than proof beyond a reasonable doubt.

Id. at 594.

REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted to Settle an Important Question of Federal Constitutional Law: Does Due Process Allow Relative Conduct Sentence Enhancements for Post-Conviction Conduct.

In criminal procedure a person can only be punished for an offense she has committed--never for an offense she may commit in the future. State v. Hall, 110 S.E.2d 868, 869 (N.C. 1959); C.J.S. Criminal Law § 44(b). In the present case, the district court punished Ocana for an act that did not transpire until after she had been indicted and convicted. The Government dismissed an indictment for this subsequent offense, preferring to include it as part of the "same course of

conduct" as an offense for which Ocana had already pled guilty.[1] By doing this, the Government avoided its burden of proving beyond a reasonable doubt that Ocana indeed committed this offense.

The "relevant conduct" or "aggregation" rule of U.S.S.G. § 1B1.3 provides the Government with tremendous leverage in drug cases. United States v. Beler, 20 F.3d 1428, 1431 (7th Cir. 1994). The Government's advantage "derives from the arbitrage-like quality of criminal trials--prosecutors must prove beyond a reasonable doubt all elements of the crimes charged in the indictment, but, once having garnered a conviction, need only prove by a preponderance of the evidence facts alleged at sentencing." Id., quoting United States v. Duarte, 950 F.2d 1255, 1263 (7th Cir. 1991). It is well settled that sentencing courts may consider a defendant's *past* criminal behavior, even if no conviction resulted from that behavior. Nichols v. United States, 511 U.S. 738, 747, 114 S.Ct. 1921, 1928, 128 L.Ed.2d 745 (1994) (emphasis added). But, before the Fifth Circuit opinion sought to be reviewed, no court has suggested that a sentencing court may use conduct which

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1. In its introduction to the sentencing guidelines, the Commission expresses an expectation that the guidelines will have a "positive rationalizing impact upon plea agreements," because, "the guidelines create a clear, definite expectation in respect to the sentence that a court will impose if a trial takes place." U.S.S.G. Ch.1, Pt. A, intro. comment. If a defendant's sentence may be enhanced on the basis of conduct occurring after the Government garnered a conviction, it would be impossible for any defendant to predict the sentence they may face when tendering a plea.

occurred months after the defendant was convicted to enhance the defendant's sentence for the offense of her conviction.

Under the current regime, once a court finds uncharged conduct at sentencing, and the compulsory fixing of the sentence on that basis, makes the sentencing itself look somewhat more like a conviction for that uncharged crime--but without the benefit of the criminal standard of proof beyond a reasonable doubt or, for that matter, an indictment or jury trial on that crime. United States v. Lombard, 102 F.3d 1, 4 (1st Cir. 1996), cert. denied, 520 U.S. 1266, 117 S.Ct. 2437, 138 L.Ed.2d 197 (1997). This Court has explained that sentencing enhancements do not punish a defendant for crimes of which she was not convicted, but rather increase her sentence because of the manner in which she committed the crime of conviction. United States v. Watts, 519 U.S. 148, 154, 117 S.Ct. 633, 636, 136 L.Ed.2d 554 (1997); United States v. Witte, 515 U.S. 389, 395, 115 S.Ct. 2199, 2204, 132 L.Ed.2d 351 (1995). But criminal conduct embarked upon after a defendant has been convicted has no bearing on the manner in which a defendant may have committed the offense for which she is sentenced.[2]

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2. The guidelines allow a defendant's sentence to be enhanced for relevant conduct "that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." U.S.S.G. § 1B1.3(a)(1). Neither the comments to the guidelines, nor the guidelines themselves, expressly authorize sentence enhancements for post-conviction conduct which is subject to a separate indictment.

In Ocana's case, the Government stretched the relevant conduct aggregation rule to an unprecedented extreme, exasperating the "fundamental unfairness" of uncharged conduct sentencing. See Beler, 20 F.3d at 1431, nt. 1 (there is a "fundamental unfairness" in sentencing a defendant for uncharged criminal acts). Ocana urges this Court to grant certiorari on this issue in order to consider whether some minimal, rational limit should be set for relevant conduct enhancements--at least a limit prohibiting enhancements for charged, post-conviction conduct.

II. Certiorari Should Be Granted to Resolve a Conflict Among the Circuits as to Whether Relevant Conduct Should Be Based on More Than a Preponderance of the Evidence when a Sentence Enhancement Is the "Tail that Wags the Dog of the Substantive Offense."

A divergence of opinion exists among the circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on more than a preponderance of the evidence. United States v. Watts, 519 U.S. 148, 156-57, 117 S.Ct. 633, 637-38, 136 L.Ed.2d 554 (1997). This Court has not yet had the opportunity to address a case which presented such exceptional circumstances. Id.; see also Kinder v. United States, 504 U.S. 946, 947-49, 112 S.Ct. 2290, 2291-92, 119 L.Ed.2d 214 (1992) (White, J., dissenting from denial of certiorari). Ocana's case presents such circumstances.

While most courts approve of a preponderance standard for "garden variety sentencing determinations," some circuits have suggested that the preponderance standard may fail to comport with due process when a sentence enhancement becomes "a tail that wags the dog of the substantive offense." United States v. Townley, 929 F.2d 365, 369 (8th Cir. 1991); United States v. Kikumura, 918 F.2d 1084, 1101 (3rd Cir. 1990). The metaphor of the "tail" (sentencing) "wagging the dog" (the substantive offense) has come to stand for those situations in which an unadjudicated offense addressed in the sentencing phase of a trial substantially increases the sentence, and thus the sentencing takes on more import than the actual conviction.[3] Lombard, 102 F.3d at 4; Townley, 929 F.2d at 369; Kikumura, 918 F.2d at 1101. Ocana's case is a prime example of this topsy-turvy brand of criminal procedure.

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3. This admittedly overused metaphor finds its origin in this Court's opinion in McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986). In McMillan, this Court refused to require a higher standard of proof on sentencing without some allegation that the sentencing was "the tail that wagged the substantive offense." McMillan, 477 U.S. at 88. Several circuit courts, led by the courts in Kikumura and Townley, have seized upon this language for the proposition that this Court might endorse a higher standard of proof in certain egregious sentencing situations. United States v. Townley, 929 F.2d 365, 369 (8th Cir. 1991); United States v. Kikumura, 918 F.2d 1084, 1101 (3rd Cir. 1990); also see United States v. Lombard, 102 F.3d 1, 4 (1st Cir. 1996); United States v. Restrepo, 946 F.2d 654, 661 n. 12 (9th Cir. 1991) (en banc), cert. denied, 503 U.S. 961, 112 S.Ct. 1564, 118 L.Ed.2d 211 (1992).

Unlike a criminal defendant whose sentence was enhanced for relevant conduct committed prior to or concurrent with the offense of his conviction, Ocana could not have known she would be sentenced for Flores' and Cervantes' conduct when she pled guilty--Flores and Cervantes did not embark on this criminal enterprise until after Ocana was convicted. The Government essentially used Ocana's plea of guilty as a blank check with which to sentence her for a charged offense for which they only had the most dubious of evidence. After it had obtained the sought-after sentence enhancement, the Government dismissed its indictment against Ocana for the Flores/Cervantes incident, ostensibly because any sentence it obtained against Ocana for a subsequent conviction for this offense would run concurrent. See Ocana, 204 F.3d at 593 (Politz, J., dissenting) (Appendix A). In other words, Ocana would not be in prison any longer had the Government went ahead and obtained this conviction. However, as Judge Politz observed, it is unlikely that the evidence against Ocana for the Flores/Cervantes incident could win the day in a civil trial, much less a criminal one. Id. at 594. As a result of this procedural end-run,[4] Ocana's sentence was tripled. Id. at 593.

The Circuits have taken a multitude of routes in addressing "relevant conduct" enhancements such as those experienced by Ocana. The Third Circuit requires that a

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4. See Powell and Cimino, Prosecutorial Discretion Under the Federal Sentencing Guidelines: Is the Fox Guarding the Hen House?, 97 W.Va.L.Rev. 373, 396 (1995) (Sentencing hearings have become mini-trials, open to becoming an "end run" around the indictment).

sentencing court employ a clear and convincing standard of proof for certain sentence enhancements. Kikumura, 918 F.2d at 1101-02. Both the Seventh and Ninth Circuits agree with this approach. Townley, 929 F.2d at 369-70; United States v. Restrepo, 946 F.2d 654, 661, nt. 12 (9th Cir. 1991) (en banc), cert. denied, 503 U.S. 961, 112 S.Ct. 1564, 118 L.Ed.2d 211 (1992); but see Id. at 663-64 (Prejerson, J., dissenting) (advocating a beyond a reasonable doubt standard). The D.C. Circuit has not foreclosed the possibility that clear and convincing evidence may be required for extraordinary upward departures and enhancements. United States v. Lam Kwong-Wah, 966 F.2d 682, 688 (D.C. Cir.), cert. denied, 506 U.S. 901, 113 S.Ct. 287, 121 L.Ed.2d 213 (1992). The First Circuit, while aware of the unfairness of certain mandatory uncharged conduct sentence enhancements, rejects the Third Circuit's approach, and instead addresses the problem by granting a sentencing judge a "pre-guideline discretion" to decide whether and how far to give weight to such enhancements. Lombard, 102 F.3d at 4. Similarly, the Second Circuit views the preponderance standard as a threshold basis for adjustments and departures, and suggests downward departures when the severity of a sentence is disproportionate to the weight of the evidence. United States v. Gigante, 39 F.3d 42, 48 (2d Cir. 1994), as amended, 94 F.3d 53, 56 (1996). The Fifth and Tenth Circuits strictly adhere to the preponderance standard for all sentencing determinations. United States v. Washington, 11 F.3d 1510, 1516 (10th Cir. 1993), cert. denied, 511 U.S. 1020, 114 S.Ct. 1404, 128 L.Ed.2d 76 (1994); United States v. Lampton, 158 F.3d 251, 257 (5th Cir. 1998), cert. denied, __ U.S. __, 119 S.Ct. 1124-25, __ L.Ed.2d __ (1999); but see Ocana, 204 F.3d at 595 (Politz, J., dissenting) (Judge Politz

perceived Ocana's case as one "embodying an unacceptable merging of the reasonable doubt standard into the preponderance of evidence standard, and less") (Appendix A).

III. Certiorari Should Be Granted to Resolve a Conflict Between the Circuits Regarding Whether Distinct and Dissimilar Offenses Can Be Considered Part of the Same Course of Conduct Under U.S.S.G. § 1B1.3.

The district court enhanced Ocana's sentence because it considered the Cervantes/Flores incident to be within the same course of conduct as the offense of conviction. (Appendix B). Offenses qualify as part of the same course of conduct if they are "sufficiently connected or related to each other to warrant a conclusion that they are part of a single episode, spree, or ongoing series of offenses." U.S.S.G. § 1B1.3 application note 9(b) (Appendix D). A court weighs three factors when making a determination as to whether offenses are sufficiently connected or related: (1) the similarity of the offenses, (2) the regularity of the offenses, and (3) the time interval between the offenses. Id. When one of these factors is absent, a stronger presence of one of the other factors is required. Id.

The Fifth Circuit Court of Appeals determined that the Cervantes/Flores incident and Ocana's offense of conviction was "significantly dissimilar" from Ocana's offense of conviction. Ocana, 204 F.3d at 590 (Appendix A). Still the Majority affirmed the district court's "same course of conduct" determination because it found that the offenses were regular and, because they were three months apart, temporally

proximate.[5] Id. at 590-91.

This decision conflicts with decisions by the Eleventh Circuit Court of Appeals which have held that significantly dissimilar criminal incidents can never be counted as part of the same course of conduct as the offense of conviction. United States v. Gomez, 164 F.3d 1354, 1356-57 (11th Cir. 1999), rehearing en banc denied, 176 F.3d 496, cert. denied, __ U.S. __, 120 S.Ct. 250, 145 L.Ed.2d 210 (1999); United States v. Blanc, 146 F.3d 847, 851-54 (11th Cir. 1998); United States v. Maxwell, 34 F.3d 1006, 1010-12 (11th Cir. 1994).

Most notably in Gomez, an Eleventh Circuit panel held that because a defendant's sale of cocaine to a third party was dissimilar to his involvement in a cocaine selling conspiracy operated out of a car wash the two incidents could not be

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5. The Cervantes/Flores incident actually occurred seven months after Ocana's offense of conviction, but the Fifth Circuit majority credits as true Flores's testimony that she made a delivery for Ocana in July of 1997--even though the District Court did not count this alleged July delivery as part of the same course of conduct. (Appendix B).

The Fifth Circuit majority also used the discredited July and September incidents to meet the regularity prong. Ocana, 204 F.3d at 591 (Appendix A). If only the November 1, 1997, incident was counted, regularity would not be met; regularity is absent when the Government only proves one additional offense. United States v. Hill, 79 F.3d 1477, 1484 (6th Cir.1996), cert. denied, 519 U.S. 858, 117 S.Ct. 158, 136 L.Ed.2d 102 (1996). Ocana raised these factual mistakes to the Fifth Circuit Court in her petition for panel rehearing, but a rehearing was denied.

considered within the same course of conduct even though they were contemporaneous. Gomez, 164 F.3d at 1356-57. Because the two incidents were only similar in that they both involved the sale of cocaine, it would require an overly broad characterization of "same course of conduct" to use the uncharged offense to calculate the base offense level under U.S.S.G. § 1B1.3. Id. at 1356.

In Ocana, like Gomez, the two incidents did not share the same accomplices, a common source, nor a similar modus operandi. Ocana, 204 F.3d at 590 (Appendix A) The only real similarity between Ocana's two offenses was that they both involved transporting marijuana to somewhere in Florida. Id. In her offense of conviction, Ocana was merely a paid courier transporting marijuana belonging to another. Id. According to Flores and Cervantes, after her conviction, Ocana herself owned the marijuana and paid others to transport it for her. Id. Unlike Gomez, Ocana's offenses were not contemporaneous, but were three months (or more) apart in time. Id. In the Eleventh Circuit, Ocana's alleged post-conviction offense could never be considered as part of the same course of conduct.

In the Eleventh Circuit, when criminal conduct is so conceptually distinct from the offense of conviction that it could be brought in a separate charge, it is clear error to include the distinct offense in calculating the sentence for the offense of conviction. Gomez, 164 F.3d at 1356-57; Blanc, 146 F.3d at 851-54; Maxwell, 34 F.3d at 1010-12. This rule holds even when the offense of conviction is that of criminal conspiracy. Gomez, 164 F.3d at 1356-57. In Ocana's case, not only was the Flores/Cervantes incident so distinct that it could have been

brought in a separate charge, it actually was brought in a separate charge. Ocana, 204 F.3d at 588, nt. 1 (Appendix A). Still, the Fifth Circuit affirmed the district court's determination that this distinct separate conduct was part of the same course of conduct as the offense of Ocana's conviction.[6]

IV. Certiorari Should Be Granted to Resolve a Conflict Between the Circuits Regarding the Proper Application of U.S.S.G. § 6A1.3.

The Fifth Circuit affirmed Ocana's sentence even though its review of the record confirmed that the testimony upon which her sentence was based "contains multiple inconsistencies." Ocana, 204 F.3d at 593 (Appendix A). The court held that it would only discard information relied upon by a district court if it was "materially untrue." Id. Further, the Fifth Circuit majority ruled that Ocana bears the burden of demonstrating that the information the district court relied on is "materially untrue." Id. Because, in its view, "inconsistent

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6. The Fifth Circuit's Ocana decision also conflicts with rulings in the Sixth and Eighth Circuits, albeit more modestly. See United States v. Russell, 76 F.3d 808, 812-813 (6th Cir), cert. denied, 519 U.S. 841, 117 S.Ct. 121, 136 L.Ed.2d 72 (1996) (The Sixth Circuit found that when a separate drug transaction lacks commonality with the offense of conviction and is four months distant, it cannot be considered relevant conduct); United States v. Montoya, 952 F.2d 226, 228-229 (8th Cir. 1991) (The Eighth Circuit held that a dissimilar drug transaction occurring four months after the offense of conviction could not be considered part of the same course of conduct).

testimony" alone is not enough to demonstrate that the testimony relied upon is materially untrue, the Fifth Circuit majority affirmed Ocana's conviction. Id.

This holding collides with a long line of decisions in the Seventh and Third Circuits. Courts in both of these Circuits have consistently held that due process demands that courts "rigorously" apply the guideline's requirement that sentencing evidence have at least a "sufficient indicia of reliability to support its probable accuracy." U.S.S.G. § 6A1.3; United States v. Acosta, 85 F.3d 275, 281-283 (7th Cir. 1996); United States v. Brothers, 75 F.3d 845, 848-849 (3rd Cir. 1996); Beler, 20 F.3d at 1432-33; United States v. Miele, 989 F.2d 659, 664 (3rd Cir. 1993).[7] In adopting its rigorously applied "*sufficient* indicia of reliability" standard for sentencing information, the Third Circuit expressly rejected its pre-guidelines "*some minimal* indicium of reliability" standard. Miele, 989 F.2d at 664-65, quoting U.S.S.G. § 6A1.3 and United States v. Baylin, 696 F.2d 1030, 1040 (3rd Cir. 1980) (emphasis added). Until recently, the Fifth Circuit still adhered to the "some minimal indicium of reliability" standard despite U.S.S.G. § 6A1.3. Lampton, 158 F.3d at 257, quoting United States v. Fulbright, 804 F.2d 847, 853 (5th Cir. 1986). Now, after Ocana, it appears that the Fifth Circuit will only discount sentencing information if the defendant can prove that this

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7. The Eighth, and Tenth Circuits have also adopted the "sufficient indicia of reliability" for sentencing information, only these circuits have yet to insist that the standard be "rigorously" applied. See United States v. Richards, 27 F.3d 465, 468 (10th Cir. 1994); United States v. Cammisano, 917 F.2d 1057, 1062 (8th Cir. 1990).

information is not only unreliable, but "materially untrue." Ocana, 204 F.3d at 593 (Appendix A).

Furthermore, the Seventh Circuit places the burden of showing reliability on the Government. Acosta, 85 F.3d at 283 (only when facts alleged in a presentence report are shown to bear sufficient indicia of reliability to support their probable accuracy that the burden of producing some evidence to demonstrate that those facts are nevertheless incorrect or otherwise unreliable is shifted to the defendant) (internal quotes omitted).

Inconsistent, uncorroborated testimony, like that offered against Ocana, could never be considered reliable enough for sentencing purposes in the Seventh or Third Circuits. In the Seventh Circuit, when "testimony relied on by the sentencing court was inherently inconsistent" the defendant has no further obligation to show that the testimony was materially untrue. Acosta, 85 F.3d at 283. "Evidence that is contradictory on its face is perhaps the prototype of unreliable evidence, and has been repeatedly recognized by this court as providing an inadequate basis for calculating a defendant's base offense level under the Guidelines." Id.; see also Beler, 20 F.3d at 1433-36 (Inconsistent and contradictory testimony by a convicted drug addict is not sufficiently reliable, even if uncontroverted); Miele, 989 F.2d at 666-67 (same). Even the Tenth Circuit, which employs a lower-standard of scrutiny than the Seventh and Third Circuits, has held that sentence enhancements cannot be based on "flatly contradictory testimony." United States v. Richards, 27 F.3d 465, 469 (10th Cir. 1994).

The district court in Ocana explicitly relied on the hearsay testimony Cervantes initially offered when arrested over the contradictory testimony she and Flores offered in court. (See Appendix B). The Fifth Circuit affirmed this approach, conflicting with the rule in the Third Circuit. In the Third Circuit, hearsay statements lack a "sufficient indicia of reliability" when the speaker of the hearsay offers contradictory testimony in court under oath. Brothers, 75 F.3d at 853.

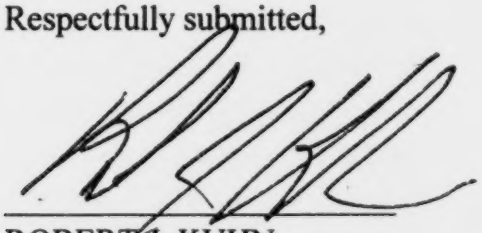
Not just a split, but a gapping chasm exists between the circuits on the issue of the "sufficient indicia of reliability" requirement of U.S.S.G. § 6A1.3. The Seventh and Third Circuits apply this standard rigorously; the Fifth Circuit refuses to apply it at all. If the Majority in Ocana is correct, a criminal defendant in the Fifth Circuit can be sentenced on uncorroborated, inconsistent and flatly contradictory testimony unless that defendant can show the testimony to be "materially untrue." Accordingly, certiorari should be granted to resolve this conflict between the circuits.

CONCLUSION

Ocana's case presents this Court with the very outer limits of relevant conduct sentencing enhancement under U.S.S.G. § 1B1.3, an oft-criticized and controversial guideline provision even in the more run-of-the-mill cases. See Lombard, 102 F.3d at 1-5; Beler, 20 F.3d at 1431-33. It also draws attention to a tremendous split between the circuits on the one provision of the guidelines that offers any procedural protection

to those sentenced in federal courts, U.S.S.G. § 6A1.3. To quote Justice White, these questions are not of the mere application or simple interpretation of the Guidelines, but are instead recurring issues of constitutional dimension, "where the varying conclusions of the Courts of Appeals determines the length of the sentence actually imposed." Kinder, 504 U.S. at 951 (White, J., dissenting from denial of certiorari). In nearly any other circuit, and certainly in the Third, Seventh or Eleventh Circuit, Ocana's sentence would only be a fraction of its current length. For these and the foregoing reasons, Petitioner respectfully prays that her petition for writ of certiorari be granted.

Respectfully submitted,



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ATTORNEY FOR PETITIONER

APPENDIX A

OPINION BELOW

IN THE UNITED STATES
COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 98-4113

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FLORA ALICIA OCANA,

Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Texas

Before KING, Chief Judge, POLITZ, and STEWART, Circuit Judges.

CARL E. STEWART, Circuit Judge:

Flora Alicia Ocana appeals the sentence she received after pleading guilty to conspiracy to possess with intent to distribute approximately 90 kilograms of marihuana, in violation of *21 U.S.C. § § 846,* 841(a)(1), and 841(b)(1)(c). Ocana challenges the district court's enhancement of her sentence based on post-conviction conduct. This post-conviction conduct led to an increase in Ocana's base level offense, and a sentence enhancement for role in the offense. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On April 19, 1997 Flora Alicia Ocana ("Ocana") was arrested after a traffic stop and found to be in possession of 90 kilograms of marihuana. In May 1997, Ocana and her co-defendant Keenan Stroud Bennet were indicted on one count of conspiracy to possess marihuana with intent to distribute, and a second count of possession of marihuana with intent to distribute. On July 25, 1997 Ocana plead guilty to the first count of the indictment. Ocana also agreed to provide a truthful rendition of the facts for the probation department in exchange for the government's agreement to dismiss count two of the indictment and recommend a sentence at the low end of the applicable guideline range. The initial presentence report ("PSR") was submitted September 26, 1997 and determined that the total offense level was 21, which was based on an offense level of 24 for possession of 90 kilograms of marihuana and a three-level decrease for acceptance of responsibility. This initial determination equaled a guideline range of 37-46 months imprisonment.

In November 1997, border patrol agents stopped Ricardo Flores ("Flores"), Norma Salina Cervantes ("Cervantes"), and Cervantes's three sons. The border patrol discovered 48 kilograms of marihuana. Cervantes immediately informed the border patrol and FBI that the drugs belonged to Ocana, who had hired them to transport the marihuana ("November 1997 offense" or "post-conviction conduct").[1] On June 5, 1998 the government provided ex parte notice to the court concerning alleged misconduct of the defendant. Based on the information about the November 1997 offense the probation officer filed an addendum to the PSR ("second addendum") recommending that Ocana be sentenced based on a total offense level of 28. This total offense level included a base offense level of 26, a figure that included the additional 48 kilograms of marihuana. In the second addendum the PSR also recommended a two-level upward adjustment for role in the offense and recommended denying the three-level decrease for acceptance of responsibility.

Ocana's attorney filed objections to the second addendum to the PSR. Ocana argued that the November 1997 offense was not relevant to her sentencing, and she also denied ownership or responsibility for the marihuana that was found by the border patrol. The probation officer filed a third addendum to the PSR in response to Ocana's objections. The third addendum to the PSR stated that pursuant to 1B1.3(a)(2) the November 1997

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1. Ocana was indicted June 10, 1998 for her part in this activity. The Government later dropped the charges. At oral argument the prosecutor stated that the reason he dropped the indictment was that any sentence rendered for the November 1997 offense would have run concurrent to the sentence received in the present case.

offense was part of the same course of conduct as the offense for which Ocana plead guilty, and therefore was required to be considered in determining Ocana's sentence.

At the sentencing hearing FBI Agent Rob Andrews ("Agent Andrews"), Flores, and Cervantes were called to testify. On the morning of the hearing Flores and Cervantes informed Agent Andrews, and testified that Ocana had recruited them to transport marihuana to Florida on at least two other occasions before they were apprehended by the border patrol in November 1997. Cervantes and Flores testified that Ocana told them to rent a van, and take their kids on the trip to make it look like a family vacation. They claimed that on all of these trips they drove the van to Winter Garden, Florida, found a hotel, and then contacted Ocana who would fly to Florida and meet them at the hotel. They stated that Ocana would pick up the van from them at the hotel and complete the final delivery of the drugs. After hearing this testimony the court overruled Ocana's objections and adopted the findings of the second addendum to the PSR. The court accepted the inclusion of the 48 kilograms of cocaine in the determination of the base offense level, the two-level enhancement for Ocana's role in the offense, and the rejection of the three-level reduction for acceptance of responsibility. The sentencing guideline range for a total offense level of 28 is 78 to 97 months. The court sentenced Ocana to a 90 month term of imprisonment and a three year term of supervised release.

DISCUSSION

Ocana raises three issues on appeal. First, Ocana argues that the district court erred in increasing her base offense level based

on conduct that occurred after she was convicted. Second, Ocana challenges the district court's finding of a two-level enhancement for role in the offense based upon evidence of Ocana's alleged post-conviction conduct. Finally, Ocana contends that the district court erred in relying on her alleged co-conspirators testimony because it did not have a sufficient indicia of reliability.

A. Standard of Review

This court normally reviews the district court's application of the Sentencing Guidelines de novo and its factual findings for clear error. A sentence will be upheld unless it was imposed in violation of law, was an incorrect application of the sentencing guidelines, or is outside the range of the applicable sentencing guideline. *United States v. Hernandez-Guevara, 162 F.3d 863, 876 (5th Cir. 1998).* Failure to object to either the PSR or the district court's sentence results in review for plain error. See *United States v. Ruiz, 43 F.3d 985, 988.*

In the present case, the Government urges this court to review the district court's application of the sentencing guidelines for plain error because Ocana did not raise the same objections in the district court that she raises in this appeal. We find that Ocana did make written objections to the PSR. The third addendum to the PSR acknowledges Ocana's objections to the second addendum to the PSR regarding the increase in her base offense level and the adjustment for her role in the offense. Ocana's objection to the second addendum's recommendation on her base offense level was as follows:

> "The defendant asserts that the information in the Second Addendum to the Presentence Report is not relevant conduct impacting her sentence of conviction. The defendant denies the ownership or any responsibility for the marihuana that Norma Cervantes and Ricardo Flores were caught transporting."

Ocana's objection to the PSR's recommendation of an upward adjustment role in the offense was "that she did not have a role in the instant offense concerning Norma Cervantes and Ricardo Flores."

The purpose of requiring defendants to make timely objections to the PSR and actual sentence is "founded upon considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact." *Ruiz, 43 F.3d at 988* (quoting *United States v. Calverley, 37 F.3d 160 (5th Cir. 1994)* (en banc)). Ocana's objections fulfill this stated purpose. While she did not specifically cite to the USSG section which the PSR applied, she did make a general objection that notified the court of her disagreement with the use of the November 1997 offense in her sentencing, and gave the district court the opportunity to address the relevance of the unadjudicated conduct. Ocana's objections to the PSR were in writing, and there was a written response by the probation officer that referenced § 1B1.3(a)(2). The district court was clearly notified of the grounds upon which Ocana's objections

were being made.[2] See *Krout, 66 F.3d 1420 at 1434* (a party should raise a claim of error in a manner that allows the district court to correct itself). Therefore, we conclude that Ocana sufficiently raised the issues which she now appeals, and we will review her claims under the normal standard of review for Sentencing Guideline issues.

B. Base Offense Level

Ocana argues that the district court erred in considering the November 1997 offense in the calculation of her base offense level because this conduct occurred after her conviction. The PSR stated that Ocana's base level offense was increased pursuant to USSG § 1B1.3. Under § 1B1.3 district courts are permitted to consider unadjudicated offenses which occur after the offense of conviction for sentencing purposes if the unadjudicated offense is "relevant conduct". In order for an unadjudicated offense to be "relevant conduct" it must be part of the same course of conduct, common scheme or plan as the offense of conviction. *Vital, 68 F.3d 114, 118 (5th Cir. 1995).* The district court found that the November 1997 offense was part of the same course of conduct as the April 1997 incident for which Ocana was convicted.

A finding by the district court that unadjudicated conduct is part of the same course of conduct or common scheme or plan is a factual determination subject to review by this court under the clearly erroneous standard. See *Vital, 68 F.3d at 118.*

2.Also Ocana's objection used the term "relevant conduct", which is the identical terminology used in USSG § 1B1.3.

Therefore, in order for Ocana to demonstrate that the district court incorrectly applied the sentencing guidelines under § 1B1.3 she must show that the district court's finding that the offenses involving Cervantes and Flores were part of the same course of conduct as the April 1997 offense was a clearly erroneous finding.

Offenses qualify as part of the same course of conduct if they are "sufficiently connected or related to each other to warrant a conclusion that they are part of a single episode, spree, or ongoing series of offenses." U.S.S.G § 1B1.3 application note 9(b). The factors that are appropriate to weigh in making the determination as to whether the offenses are sufficiently connected or related include "the degree of similarity of the offenses, the regularity of the offenses, and the time interval between the offenses." Id. When one of the factors is absent, a stronger presence of at least one of the other factors is required. Id.

In the present case, there is not a significant degree of similarity between the April 1997 offense and the post-conviction conduct involving Cervantes and Flores. The one major similarity is that the offenses all involved transporting marihuana to Florida.[3] Other than the common drug and

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3. There is some dispute as to whether Florida was the intended destination for the April 1997 offense. Ocana's co-defendant in that case, Bennet, claimed that he and Ocana were originally supposed to complete the transaction in Atlanta. However, Ocana in cooperation with the FBI made the drug delivery to Bennet in Florida.

delivery location the April 1997 offense is significantly dissimilar from the offenses involving Cervantes and Flores. First, there is no evidence of similar accomplices, common source, or supplier. See *United States v. Wall, 180 F.3d 641, 646 (5th Cir. 1999)* (common source, supplier and modus operandi considered by court in determining similarity of offenses). In the April 1997 offense Ocana claimed to be transporting drugs at the behest of Keenan Bennet, and informed the FBI that she had met Bennet through a lawyer named Bob Meier. In the Cervantes and Flores offenses they claim that Ocana recruited them to transport drugs and that the other person involved in the transaction was a car wash owner named Aaron Munoz. The modus operandi for the offenses is also different. In April 1997, Ocana drove a van and met Bennet at an airport. In the Cervantes and Flores offenses they drove a rented van to a hotel and Ocana flew and met them at the hotel in Florida. Based on all of these factors the April 1997 offense and the Cervantes/Flores offenses are not sufficiently similar.

Therefore, one of the other factors in determining same course of conduct; temporal proximity of the offenses, or regularity of the offenses must be stronger. In the present case, there is close temporal proximity of the offenses. Cervantes and Flores claim that they made their first trip transporting drugs for Ocana in July 1997, and that they made two other trips in September and November. Therefore these offenses took place only three months after Ocana's offense of conviction. It appears that the only time there was no drug activity was the time between Ocana's arrest in April and her guilty plea in July. Even if we discount the testimony of Cervantes and Flores about the incidents that were not disclosed until the day of the sentencing

hearing,[4] and consider only the November 1997 offense, at the most only seven months elapsed between Ocana's offense of conviction and this November 1997 offense.

It is well settled in this circuit that offenses which occur within one year of the offense of conviction may be considered relevant conduct for sentencing. See *United States v. Bethley, 973 F.2d 396, 400-01 (5th Cir. 1992)* (finding drug transactions that occurred six months prior to the offense of conviction to be relevant conduct); *United States v. Moore, 927 F.2d 825, 828 (5th Cir. 1991)* (drugs seized five months prior to conviction could be considered relevant conduct). In two recent cases this court has found that the time interval between offenses is too remote to consider the extraneous offense to be relevant conduct. In both of those cases the offense of conviction took place more than a year in time from the offense in question. See *United States v. Miller, 179 F.3d 961, 966 n. 10 (5th Cir. 1999)* (finding that a drug offense that occurred 21 months prior to the offense of conviction was too remote in time to be considered a positive factor for same course of conduct); *Wall, 180 F.3d 641, 645-46 (5th Cir. 1999)* (finding that drug offenses separated by four and five years lacked temporal proximity to the offense of conviction). In the present case, because the offense of conviction and the November 1997 offense took place within seven months of each other there is sufficient

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4. On the day of the hearing Cervantes and Flores testified that they also transported drugs for Ocana in July and September. They had previously told the border patrol and the FBI that the November 1997 offense was their first time transporting drugs for Ocana.

temporal proximity to find that the offenses were part of the same course of conduct.

Finally, the third factor of regularity of the offenses is also present. Cervantes and Flores testified that Ocana recruited them for trips in July, September and November. Therefore, Ocana was participating in drug transactions bimonthly. Based on the close temporal proximity and regularity of the offenses the district court did not clearly err in finding that the April 1997 offense and the offenses involving Cervantes and Flores were part of the same course of conduct.

Ocana relies on our decision in *Lara v. United States, 975 F.2d 1120, 1128 (5th Cir. 1992),* for the proposition that a sentencing enhancement for post-conviction conduct should be applied to the crime committed while on release and not the original crime for which the defendant is currently being sentenced. However, in Lara the sentence enhancements were made by the district court pursuant to *18 U.S.C. § 3147* and USSG § 2J1.7, not under USSG § 1B1.3 which allows for adjustment of base offense level for post conviction conduct under certain circumstances.[5]

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5. The appellant also cites *United States v. Pace, 955 F.2d 270, 277 (5th Cir. 1992)* as authority for the argument that district court's should not enhance sentences based on post conviction offenses. However, as in Lara the Pace decision interpreted a sentence enhancement pursuant to *18 U.S.C. § 3147,* not § 1B1.3(a)(2).

At the sentencing hearing the district court heard and weighed the testimony of Agent Andrews, Cervantes, and Flores and concluded that Ocana's alleged participation in drug transactions involving Cervantes and Flores were part of the same course of conduct as the offense of conviction. After a careful review of the record we conclude that the district court's finding was not clearly erroneous. Thus, based on the finding that the post conviction conduct was relevant conduct under § 1B1.3 the district court properly applied the guidelines and adjusted Ocana's base offense level upward to include the marihuana found in the possession of Cervantes and Flores in November 1997.

C. Role in the Offense

The district court also adopted the PSR's recommendation that Ocana receive a two-level upward adjustment for role in the offense. The original PSR contained no adjustment for role in the offense. The probation officer added this recommendation for a two level enhancement based solely on Ocana's post-conviction conduct. The appellant argues that the district court erred in determining her role in the offense based solely on the facts of the November 1997 offense which as post-conviction conduct had no connection to the offense for which she was convicted.

Sentencing guideline § 3B1.1 allows for a sentence enhancement based on the defendant's role in the criminal activity. Contrary to the appellant's argument, post-conviction conduct may be considered in determining a defendant's role in the offense, if that post-conviction conduct is determined to be

relevant conduct under the sentencing guidelines. The introductory commentary for section 3B1.1 instructs that "the determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of 1B1.3 (Relevant Conduct)...and not solely on the basis of elements and acts cited in the count of conviction." U.S.S.G. § 3B1.1 introductory commentary. Also, this court has held that conduct which is the basis for an upward adjustment made pursuant to section 3B1.1 must be "anchored to the transaction, however we will take a common-sense view of just what the outline of that transaction is. It is not the contours of the offense charged that defines the outer limit of the transaction; rather it is the contours of the underlying scheme itself. All participation firmly based in that underlying transaction is ripe for consideration in adjudging leadership role." *United States v. Mir, 919 F.2d 940, 944 (5th Cir. 1990). Mir* points out that the introductory commentary of section 3B1.1 shows that section 3B1.1 is "intended to comport with other guideline sections allowing a sentencing judge to look beyond the narrow confines of the offense to consider all relevant conduct." [6] *Id. at 945;* see also, *United States v. Montoya-Ortiz, 7 F.3d 1171, 1181 (5th Cir. 1993).*

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6. Other circuits have also held that the introductory commentary to section 3B1.1 instructs district courts to consider all relevant conduct when determining a defendant's role in the offense, and that this relevant conduct can include offenses for which the defendant was neither charged or convicted. See e.g., *United States v. Bapack, 327 U.S. App. D.C. 208, 129 F.3d 1320, 1325-26 (D.C. Cir. 1997); United States v. Billingsley, 115 F.3d 458, 465 (7th Cir. 1997); United States v. Savage, 67 F.3d 1435, 1443 (9th Cir. 1995).*

Therefore, in determining Ocana's role in the offense the district court properly considered all transactions that it determined to be relevant conduct under the sentencing guidelines. The district court made a determination that the relevant conduct in the present case included the offenses involving Cervantes and Flores. In Part B, we affirmed the district court's ruling regarding relevant conduct. Thus, as a matter of law the district court properly considered the post-conviction conduct when determining Ocana's role in the offense.

We review the district court's fact-finding regarding role in the offense for clear error. See *United States v. Rodriguez, 897 F.2d 1324, 1325 (5th Cir. 1990),* cert. denied, *498 U.S. 857, 111 S. Ct. 158, 112 L. Ed. 2d 124 (1990).* Cervantes and Flores both testified that Ocana recruited them to transport marihuana to Florida. They further testified that Ocana provided them money to rent a van, and paid them for their participation in the transactions. While there was no independent corroboration for any of the allegations made by Cervantes and Flores, the district court found their testimony reliable.[7] In light of the introductory

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7. In cases in this circuit co-conspirator testimony alone typically has not been used to determine a defendant's role in the offense. In *Mir*, we upheld a sentence enhancement for role in the offense, and in that case the DEA special agent who worked undercover in the drug cartel testified that Mir was one of the leaders of the cocaine distribution network. The DEA agent gave multiple examples of the work of Mir's organization and his first hand observations of Mir's involvement. See *Mir, 919 F.2d at 942.*

In *United States v. Barbontin, 907 F.2d 1494, 1497 (5th Cir.*

commentary to section 3B1.1 which allows the district court to consider all relevant conduct in its determination of role in the offense, and the testimony of Cervantes and Flores which clearly implicates Ocana as the leader, recruiter, and manager of their drug transactions we conclude that the district court did not err in its upward adjustment of Ocana's sentence for role in the offense.

D. Co-Conspirator testimony

At the sentencing hearing the district court heard testimony from Cervantes and Flores, and used their testimony as a basis for determining Ocana's base offense level and her role in the offense. Ocana argues that Cervantes and Flores testimony did not meet the standard for reliability as set forth in USSG § 6A1.3, because their testimony was inconsistent with their prior statements, and they both had motive to testify falsely.

1990) we noted that as evidence to support an upward adjustment for role in the offense the government offered the testimony of a DEA agent who testified that his investigation had established that *Barbontin* was the leader of a large drug importation enterprise.

In the present case, due to the inconsistencies of the co-conspirators' testimony independent corroboration of their statements would certainly have enhanced the weight of the evidence. Nonetheless, the introductory commentary for section 3B1.1 and the case law do not require independent corroboration of co-conspirator testimony in assessing role in the offense.

This court reviews a district court's determinations of witness credibility for clear error. *United States v. Gaytan, 74 F.3d 545, 558 (5th Cir. 1996).* For the purposes of sentencing the district court may consider information without regard to its admissibility. Id. Furthermore, the defendant bears the burden of demonstrating that the information the district court relied on is "materially untrue". *United States v. Young, 981 F.2d 180, 185 (5th Cir. 1992).*

Our review of the record confirms Ocana's claim that the testimony of Cervantes and Flores contains multiple inconsistencies. Cervantes and Flores inconsistent testimony alone, however, is not enough to demonstrate that this testimony upon which the district court relied is materially untrue. The inconsistent pattern of their testimony in and of itself does not command that we ignore the district court's appreciation of their testimony as reliable. Given our highly deferential standard of review for factual determinations, we cannot hold that the district court's credibility determination was clearly erroneous.

CONCLUSION

We affirm the district court's consideration of post-conviction conduct to adjust Ocana's base offense level pursuant to USSG § 1B1.3. We also affirm the district court's upward adjustment of Ocana's sentence for role in the offense, and the district court's reliance on the co-conspirator's testimony at the sentencing hearing.

AFFIRMED.

POLITZ, Circuit Judge, dissenting:

Stripped to essentials, the defendant's sentencing exposure was nearly tripled by evidence of subsequent conduct consisting of inconsistent testimony of witnesses the government candidly recognized as presenting "a credibility problem." Those of us charged with applying federal criminal sanctions are acutely aware that post-sentencing guideline procedures have impacted markedly the criminal law/punishment scene. Some aspects of the changes we can and do accept as legislative prerogative. Others are not so readily acceptable. The instant case presents just such a conundrum.

Ocana is guilty of the offense for which she was indicted in May 1997 and pled guilty in July 1997.[8] She subsequently was indicted in July 1998 for conduct allegedly occurring in November 1997. That indictment was dismissed by the government, ostensibly because the sentence for it and the present offense would likely have been made to run concurrent. I am neither persuaded nor impressed by this explication given by the government at oral argument.

It is a basic tenet of our constitutional system that guilt of a criminal offense can be established only by a free and voluntary plea of guilty accepted by the court after careful examination, or by a finding by a judge or jury, based on reliable evidence proving guilt beyond a reasonable doubt. Only then may one

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8. Conspiracy to possess with intent to distribute approximately 90 kilograms of marihuana, in violation of *21 U.S.C. § § 846,* 841 (a)(1), and 841 (b)(1)(c).

constitutionally be punished for that criminal offense. Today's decision, and others like it that appear to be part of an ever increasing number, erode that basic tenet to the point that we must, in all candor, concede that today punishment for criminal conduct is not limited to the criminal conduct for which one has pled guilty or which has been established by proof beyond a reasonable doubt.

In my judgment, the due process clause does not permit of this erosion. Some of these shortcuts, simplifications of criminal procedure, as some would suggest, violate the due process clause which imposes a burden on the government to prove every element of a charged criminal offense beyond a reasonable doubt,[9] a requirement dating from our early years as a nation.[10] The reason is obvious - requiring the proof of guilt beyond a reasonable doubt reduces the risk of convictions and resultant punishment resting on factual error.[11] Recognizing the vital role the reasonable doubt standard plays in our criminal justice schema, the Supreme Court has noted that "a person accused of a crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be

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9. *United States v. Williams, 20 F.3d 125* (5th Cir.), *cert. denied, 513 U.S. 891, 130 L. Ed. 2d 162, 115 S. Ct. 239,* and *cert. denied, 513 U.S. 894, 130 L. Ed. 2d 168, 115 S. Ct. 245 (1994).*

10. *In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970).*

11. *Id. at 363.*

adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case."[12]

One would assume that one could understand this teaching by the Supreme Court as meaning that those things essential to the question of one's guilt of a criminal offense, and those things that factor critically into the punishment therefor, must be established by proof beyond a reasonable doubt. At this point in time, however, such is not the case. At this point in time the proof of guilt of the charged offense must be beyond a reasonable doubt but the proof of "facts" upon which the sentence is based, the *sine qua non* of punishment for that criminal offense, need only be by a level of proof far below that mandated in a criminal trial. Indeed, I presume to suggest, on more than a few occasions by a level of proof which would not carry the day in a contested civil case.

"Relevant conduct" is an important, if indeed not critical, part of the sentencing formula. The sentencing guidelines require the government to prove relevant conduct by a mere preponderance of the evidence.[13] Information considered at sentencing must have a "sufficient indicia of reliability," and

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12. *Id. at 363* (quoting with approval the state court in *W. v. Family Court, 24 N.Y.2d 196, 205, 299 N.Y.S.2d 414, 247 N.E.2d 253 (N.Y. 1969)).*

13. *United States v. Lampton, 158 F.3d 251 (5th Cir. 1998), cert. denied, 119 S. Ct. 1124, 143 L. Ed. 2d 119,* and *cert. denied, __U.S.__, 119 S. Ct. 1125 (1999).*

district courts are accorded broad discretion in considering the reliability of information supporting relevant conduct.[14]

I perceive the instant case as embodying an unacceptable merging of the reasonable doubt standard into the preponderance of evidence standard, and less. By accepting the government's proof of the subsequent conduct by evidence which, in my opinion, would not have sufficed in a criminal trial, indeed probably would have been found wanting in a civil trial, and thereby markedly increasing Ocana's exposure under the sentencing guidelines, neuters the constitutional assurance that one shall not be deprived of liberty and freedom based upon anything less than proof beyond a reasonable doubt.

My majority colleagues opine that one's guilt must be proven beyond a reasonable doubt but the punishment one receives for that transgression may be based on facts proven to some uncertain level of reliability, including that only sufficient to prevail in a civil case and less. I cannot accept and lend support to this proposition. I consider what has happened to this defendant in the sentencing process unjust. I must respectfully dissent.

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14. U.S.S.G. § 6A1.3(a); *United States v. Martinez-Moncivais, 14 F.3d 1030* (5th Cir.), *cert. denied, 513 U.S. 816 (1994).*

APPENDIX B

FINDINGS OF FACT BY THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

UNITED STATES OF AMERICA	]	
VS.	]	CRIMINAL ACTION NO. V-97-19-02
FLORA ALICIA OCANA	]	

- -

SENTENCING HEARING
BEFORE HONORABLE JOHN D. RAINEY

Heard Friday, August 28, 1998

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APPEARANCES

FOR THE UNITED STATES OF AMERICA:

Mr. Timothy G. E. Hammer
UNITED STATES DISTRICT ATTORNEY'S OFFICE
606 N. Carancahua, Suite 1400
Corpus Christi, Texas 78476

FOR THE DEFENDANT:

(For Flora Alicia Ocana)
Mr. Thomas J. Barry
Attorney at Law
P.O. Box 1921
Victoria, Texas 77902

UNITED STATES COURTS
SOUTHERN DISTRICT OF
TEXAS FILED SEP 23 1998
MICHAEL N. MILBY
CLERK OF COURT

THE COURT: All right. Any further comments or arguments concerning your objections before I make the findings necessary to establish her guidelines?

MR. BARRY: The only comments I need to make, Judge, really depend on the factual ruling. That is, I would like to visit some on acceptance of responsibility and the other impacts based on the factual findings related to the relevant conduct. So I -- I'm sorry I don't know what order to take that in. I will go ahead and speak to it if you want

THE COURT: If you would prefer that I make the finding on relevant conduct first I will if that's --

MR. BARRY: It might save us some time is all.

THE COURT: All right, very well. Mr. Hammer, do you have anything else that you want -- any comments you want to make concerning the objections before the Court?

MR. HAMMER: Your Honor, the Government would state on the relevant conduct issue that we believe it has been established by a preponderance of -- naturally as many of these witnesses are a credibility problem, Your Honor. But what the Government would point out is that Ms. Cervantes made an immediate report to the Border Patrol the night that she was arrested. So the Government would argue that this was not some type of recent fabrication although they obviously failed to disclose to the Government the other three trips that they made which they say they made for the Defendant.

I think also right here corroborates what was going here was the mention of Mr. Martinez the attorney who was the attorney for Ms. Ocana who according to these two individuals made appearances or appeared and talked to them in McAllen and also had contact with them or was trying to bond them out in Brook county. In fact, Mr. Martinez was -- withdrew because of the apparent conflict of interest. That relationship the Government believes lends credibility what they were saying as far as what was occurring with this defendant.

And also as far as the credibility of Mr. Flores he really didn't talk about Ms. Ocana, he talked about this Mr. Munoz, he also basically implicated his stepson in this conspiracy by virtue of the fact that it was the stepson who passed the information on to them. Mr. Flores then asked his stepson to tell Ms. Ocana and that led to these deductions -- it is not like they are simply pointing the finger at Ms. Ocana. There are players here that they apply to the different things that the Government feels there is evidence by preponderance to find relevant conduct.

THE COURT: I agree. I'm going to overrule the objections. I find that the November 1, 1997 seizure of I believe it was the 48 kilos and the possession of Mr. Flores and Ms. Cervantes is -- would be considered part of the same course or conduct of the offense for which Ms. Ocana has been convicted. It is therefore relevant conduct and will be considered in the base offense level. The objection is overruled as set forth in the second addendum to the presentence report the base offense level has now been increased to 26.

There was another objection to the role in the offense in Paragraph 15. I'm going to overrule that objection. That causes a two level increase creating an adjusted offense level of 28. The only other objection I believe that has been lodged that would affect the guidelines is the acceptance of responsibility and Mr. Barry I think you wanted to address that.

MR. BARRY: Yes. If I may, Your Honor. Acceptance of responsibility as I read the guidelines the probation officer's report simply says because not obeying the law essentially we are going to withdraw acceptance of responsible credit. But I don't see that in the guideline.

The guideline sets out in the application notes several factors that affect acceptance of responsibility and we are talking about a three level reduction here because I don't believe the Government argues about prompt acceptance. Their only objection or their only claim is that she should not get any adjustment based on the fact that she continued to do something after she had been caught. The guideline speaks to frivolously contesting relevant conduct or falsely denying which all Ms. Ocana has done as I see it is contested and not frivolously given

the credibility problems with the Government's witnesses relating to relevant conduct.

So I believe she should get the full three level adjustment for acceptance of responsibility. There is no question about the offense conduct and her acceptance of it.

THE COURT: I will deny or overrule that objection, deny the request for downward reduction and the offense level for acceptance of responsibility as stated by the probation officer accurately to qualify when you look in the notes to Section 3(e) 1.1 she has not demonstrated acceptance because she has not voluntarily withdrawn from criminal conduct.

Obviously I am finding on the base offense level by making that finding also would make a finding that she has continued to engage in criminal conduct after the offense for which she is charged before me. Therefore she has not demonstrated acceptance I would deny that. That creates a total offense level of 28. Mr. Barry, unless I have overlooked something are there any other objections.

MR. BARRY: That addresses all of the Defendant's objections to the PSI.

THE COURT: Therefore, it is the finding of the Court the total offense level will be 28. She had no criminal history points prior to this conviction, therefore her criminal history category is a Level One. That is the finding of the Court. In all other respects I will adopt as my findings the findings set forth in the presentence report. That creates a guideline range of 78 to 97 months, three years of supervised release, a $12,500.00 to $1 million fine range and a $100.00 special assessment.

Mr. Barry, I would recognize you at this time for my further comments you would like to make on of behalf of Ms. Ocana before I sentence her.

MR. BARRY: The final matter to be addressed, Your Honor, is our -- basically it's a Defendant's Motion for Downward Departure which the guidelines don't really adopt. I know the Court has been here and done this. The argument is essentially is it's a tank fair. She helped them, she gave them a co-defendant, she gave them information that they could use and is not getting any benefit from them essentially after risking her life even in the course of doing that. And if the Government chooses to not make a motion I don't know what the Defendant can do about it essentially other than stand up here and yell about it. That's what I -- that's what I'm doing.

The original plea agreement contemplated I believe a thirteen level downward departure. That is if the relevant conduct had never happened I believe the Government would have made a downward departure, it would have made her probation eligible which would have required a thirteen offense adjustment. What I have suggested to the Court is the Court take some fraction of the thirteen levels, adjust downward based on her helping the Government out with the case against the Co-Defendant.

THE COURT: Mr. Hammer?

MR. HAMMER: The Government's response is that the plea agreement provided it had a misconduct clause in it if there was any misconduct committed by the Defendant in the Government's assessment then the deal was essentially off and

the Government was not bound to make any recommendation for acceptance, not bound to make any recommendation for downward departure and to argue for any sentence within the applicable guideline range.

The Court's findings reflect that there has been misconduct and the Government is not bound to make any motion for departure. The Government notes that this has happened and would like to see defendants help the Government and benefit themselves but they have got to stay out trouble which she hasn't.

THE COURT: Okay. I will not downward depart outside of the guidelines. Do you have anything further that you would like to say at this time as to what the appropriate punishment would be within the guidelines you may do so at this time.

MR. BARRY: All right. Your Honor, we will ask that the Court do observe the plea bargain and in exchange for the plea of guilty which the Government has obviously done sentence at the minimum end of the guideline range.

THE COURT: Ms. Ocana, do you have anything you would like to say?

FLORA ALICIA OCANA: The only thing I can say is I'm not guilty of what they did. I had nothing to do with that. I did not conspire in any way. I'm guilty of what I did and I took responsibility for that and I assisted the FBI but I had nothing to do with them. Everything that they said is not true.

We were not in speaking terms. We were in -- back and forth because of our kids.

My daughter is pregnant from their son, he doesn't want to take responsibility. We kept arguing back and forth as parents do of course. But that's no reason for them to do this to me.

They say that they did it to me because they thought that since I told them the FBI wanted me to turn in people I didn't have no one to turn in. I saw them a day before they left and they said that they turned me in because they thought I was going to turn them in first. I didn't even know they had done anything.

I had nothing to do with that. I'm not guilty of that. I will never plead guilty because I know in my heart I'm not guilty.

THE COURT: Anything further?

MR. BARRY: Nothing from the defense, Your Honor.

THE COURT: Mr. Hammer, do you have anything concerning sentencing?

MR. HAMMER: Your Honor, I don't think I can even bring myself to recommend the low end of the guidelines. I think a sentence at midpoint to a very high end is appropriate. A real flagrant violation of Defendant's bond conditions and essentially the trust that was placed on her when she was put out of bond and admonished to stay out of trouble. She certainly didn't do that.

THE COURT: Having made the findings I have made today I do not believe the low end of the guidelines would be appropriate either. One of the purposes of sentencing, Ms. Ocana, or bringing anyone to justice and imposing what we hope would be a just punishment is to hope to deter people form continuing to engage in criminal conduct to set an example, to protect the public from further criminal activity.

This is a classic case in my opinion of where you have not learned anything or any lesson from being apprehended for a very serious drug crime and to continue to engage in that is simply almost like thumbing your nose at the criminal justice system.

Bu the purpose of the guidelines is to establish a range for what would be a reasonable punishment for what you have had done. I note that before I made the findings today you were looking at 37 to 46 months. At the low end would have been 37 months and certainly as has been stated here today you might have even received the downward departure at the request of the Government and could have received any less time than that. But by continuing to engage in criminal conduct your sentence certainly is going to be much worse once we have reconsidered this relevant conduct and you are going to basically do more than twice as much time in prison as a result of it.

It would be the judgment of this Court that you be committed to the custody of the Bureau of Prisons to be imprisoned for a term of 90 months, 7-1/2 years. You shall pay the United States a special assessment of $100.00, upon release from prison you will be placed on supervised release for a period of three years and you shall abide by all of the standard terms and conditions of supervision which have been adopted by this Court.

You shall also comply with the following special condition and that is you shall submit to periodic drug detection or tests as determined necessary by your probation officer, you will pay for any charges incurred in that connection to the extent you have the ability to pay.

This was a crime obviously committed for the purpose of making money. It does not appear that you have the ability to pay a fine within the guideline range but I think that some fine should be ordered.

I'm going to order that a fine of $5,000.00 be paid. It is due and payable immediately and to the extent you are not able to pay it by the time you are released from prison the probation officer will establish by assistance from the Court a payment schedule to pay off any balance monthly while your are on supervised release.

APPENDIX C

ORDER ON REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-41133

UNITED STATES OF AMERICA,
Plaintiff - Appellee

v.

FLORA ALICIA OCANA
Defendant - Appellant

U.S. COURT OF APPEALS
FILED MAR 27 2000
CHARLES R. FULBRUGE
CLERK

Appeal from the United States District Court for the Southern District of Texas, Victoria

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ON PETITION FOR REHEARING

Before KING, Chief Judge, POLITZ, and STEWART, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED

ENTERED FOR THE COURT:

Charles E. Stewart
United States Circuit Judge

CLERK'S NOTE: See FRAP and Local Rules 41 for Stay of the Mandate.

HENRY A. POLITZ, Circuit Judge, dissenting.

APPENDIX D

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS

United States Constitution Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Sentencing Guidelines

§ 1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (I) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1)(A) all acts and omisions committed, aided, abetted, counseled, commanded, induced, procured, or wilfully caused by the defendant; and

(B) in the case of jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omisions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

(b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

United States Sentencing Guidelines

§ 1B1.3 Application Notes

9. "Common scheme or plan" and "same course of conduct" are two closely related concepts.

(B) Same course of conduct. Offenses that do not qualify as part of a common scheme or plan may nonetheless qualify as part of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of the single episode, spree, or ongoing series of offenses. Factors that are appropriate to the determination of whether offenses are sufficiently connected or related to each other to be considered as part of the same course of conduct include the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses. When one of the above factors is absent, a stronger presence of at least one of the other factors is required. For example, where the alleged to be relevant is relatively remote to the offense of conviction, a stronger

showing of similarity or regularity is necessary to the compensate for the absence of temporal proximity. The nature of the offenses may also be a relevant consideration (**e.g.** a defendant's failure to file tax returns in three consecutive years approximately would be considered as part of the same course of conduct because such returns are only required at yearly intervals).

United States Sentencing Guidelines

§ 6A1.3. Resolution of Disputed Factors (Policy Statement)

(a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant evidence without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

(b) The court shall resolve disputed sentencing factors at a sentencing hearing in accordance with Rule 32(c)(1), Fed. R. Crim. P.